

REMARKS

This paper is submitted in reply to the Office Action dated May 14, 2008, within the three-month period for response. Reconsideration and allowance of all pending claims are respectfully requested.

In the subject Office Action, the Examiner rejected claims 1-2, 4, 7-10, 12, 14-18, 20, 22, 25-28, 30, 33-34 under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent Application Publication No. 2002/0166117 to Abrams et al. (Abrams). In addition, claims 3, 5, 6, 11, 13, 21, 23, 24, 29 and 31 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Abrams in view of U.S. Patent Application Publication No. 2004/0030575 to Fackre et al (Fackre). Furthermore, the Examiner rejected claim 19 under 35 U.S.C. § 103(a) as being unpatentable over Abrams in view of U.S. Patent Application Publication No. 2005/0228856 to Swildens et al. (Swildens) and claim 32 was rejected under 35 U.S.C. § 103(a) as being unpatentable over Abrams in view of Swildens and in further view of U.S. Patent Application Publication No. 2003/0172145 to Nguyen.

Applicant respectfully traverses the Examiner's rejections to the extent that they are maintained. Applicant has canceled claims 3, 5-7, 12, 14, and 16-34 from further consideration in this application and has amended claims 1, 8, 13 and 15. In particular independent claim 1 has been amended to include some or all of the limitations of now canceled claims 3, 5-7, 12, and 14, among others. Claims 8, 13, and 15 have been amended for continuity with claim 1. Applicant has also added new claim 35. Applicant is not conceding in this application that the subject matter encompassed by the amended and canceled claims prior to this Amendment is not patentable over the art cited by the Examiner. The amendments are made solely to facilitate expeditious prosecution of the remaining claims. Applicant respectfully reserves the right to pursue additional claims, including the subject matter encompassed by the amended and/or canceled claims, as presented prior to this Amendment, in one or more continuing applications. Applicant also submits that no new matter is being added by the above amendments, as the amendments are fully supported in the specification, drawings and claims as originally filed.

Now turning to the subject Office Action, and initially with regard to the Examiner's § 102(e) rejection of claim 1, in order for a reference to anticipate a claimed invention that reference must teach each and every element in the precise arrangement set forth in the

claim. See MPEP § 2131. If the reference fails to teach even one of the claimed features claimed invention cannot be anticipated by the reference.

Claim 1 generally recites a method for determining a cost for using a standby resource in a computer system, the standby resource being activated in response to a resource requirement. The method comprises automatically determining a cause of the resource requirement, where determining the cause of the resource requirement further includes detecting an occurrence of a failure. A code is retrieved that is associated with the determined cause from an electronic log and, in response to retrieving the code, the code is correlated to a charge indicator. The charge indicator pertains at least in part to the determined cause, and the charge indicator includes a reduced rate relative to another charge indicator that is correlated to another code that is associated with a cause other than a cause associated with an occurrence of a failure. The method further comprises determining a duration of standby resource activation in response to automatically determining the cause of the resource requirement. The cost for using the standby resource is determined according to the charge indicator and the duration of standby resource activation such that the cost for using the standby resource is reduced relative to if the cause of the resource requirement was for other than an occurrence of a failure.

The most recent amendments to claim 1 include, in no particular order, (1) that determining the cause of the resource requirement further includes detecting an occurrence of a failure, (2) retrieving a code associated with the determined cause from an electronic log, (3) correlating the code to a charge indicator in response to retrieving the code, (4) that the charge indicator pertains at least in part to the determined cause, (5) that the charge indicator includes a reduced rate relative to another charge indicator that is correlated to another code that is associated with a cause other than a cause associated with an occurrence of a failure, (6) determining a duration of standby resource activation in response to automatically determining the cause of the resource requirement, and (7) that the cost for using the standby resource is determined according to the charge indicator and the duration of standby resource activation such that the cost for using the standby resource is reduced relative to if the cause of the resource requirement was for other than an occurrence of a failure.

Support for the amendments found in (1) above may be found, for example, in now canceled claim 14, paragraphs [0017]-[0019] and [0041], as well as FIG. 3 block 61 of the

published application. Support for the amendments found in (2) above may be found, for example, in now canceled claim 5, paragraphs [0045] and [0047], as well as FIG. 4 block 84 of the published application. Support for the amendments found in (3) above may be found, for example, in now canceled claims 3 and 6, paragraph [0048], and FIG. 4 block 90 of the published application. Support for the amendments found in (4) above may be found, for example, in paragraphs [0048] and [0049] of the published application. Support for the amendments found in (5) above may be found, for example, in now canceled claim 12, paragraphs [0023] and [0049], as well as FIG. 4 blocks 94-98 of the published application. Support for the amendments found in (6) above may be found, for example, in now canceled claim 7, paragraphs [0020], [0021] and [0041]-[0044], as well as FIG. 3. Support for the amendments found in (7) above may be found, for example, in now canceled claim 7, paragraphs [0017], [0019], [0021]-[0023], [0048]-[0050], and [0052]-[0054] as well as FIG. 4 and FIG. 5. Thus, amended claim 1 now includes some or all of the limitations of now canceled claims 3, 5-7, 12 and 14, as well as other limitations having support throughout the specification.

In rejecting claims 3, 5 and 6, the Examiner alleges that Abrams in view of Fackre renders the claim unpatentable. In regards to the rejections of claims 3, 5, and 6, the Examiner admits that Abrams fails to disclose that determining the cause of the resource requirement further includes correlating a code indicative of the cause to a charge indicator used to determine the cost, that determining the cause of the resource requirement further includes retrieving a code associated with the cause from an electronic log, and that determining the cost for using the standby resource further includes correlating the code to a billing rate. As indicated, Applicant has amended claim 1 to include some or all of the limitations of now canceled claims 3, 5 and 6. Thus, Applicant respectfully requests that the Examiner withdraw the §102(e) rejection of claim 1. Applicant additionally respectfully submits that Abrams and Fackre, whether taken alone or in combination, still fail to disclose or suggest each and every limitation of claim 1.

For example, claim 1 recites automatically determining a cause of the resource requirement, including detecting an occurrence of a failure. With respect to Abrams, this reference fails to disclose or suggest the automatic determination of the cause of a resource requirement and the detection of the occurrence of a failure. Abrams is directed towards providing on-demand computational resources to application providers solely in response to

requests from those application providers for those computational resources. See Abrams, paragraph [0019], as well as the prosecution history of Abrams, and in particular the Response of August 5, 2005. Thus, Abrams fails to disclose or suggest automatically determining anything, let alone determining the cause for the resource requirement, as Abrams is strictly responsive to user requests in order to implement its on-demand computational resources. Indeed, Abrams actively teaches away from the limitations of claim 1 by disclosing a reliance on user requests to activate or deactivate computational resources.

Additionally, Applicant respectfully submits that the Examiner has improperly conflated the disclosure of increased and decreased demand for computational resources in Abrams with the recitation of determining a cause of the resource requirement in claim 1. Claim 1 clearly indicates that a cause of the resource requirement is automatically determined. Claim 1 additionally recites various limitations that are responsive to, dependent on, or associated with the determined cause, such as a code, charge indicator, and the cost of the standby resource activation. Applicant thus submits that the automatic determination of the cause of the resource requirement recited in claim 1 cannot be waived away by the disclosure in the Abstract of Abrams that resources are activated or deactivated based on demand. Rather, Abrams is silent as to the cause of the resource requirement, and thus fails to disclose or suggest the automatic determination of a cause of the resource requirement. Additionally, Abrams fails to disclose that determining a cause of the resource requirement includes detecting an occurrence of a failure. For much the same reasons as discussed in connection with Abrams' failure to automatically determine a cause for the resource requirement, Abrams fails to detect anything other than a request from an application provider for more, or less, computational resources. Thus, Abrams fails to disclose determining the cause for the resource requirement, and that determining the cause includes detecting an occurrence of a failure.

Fackre fails to relieve the deficiencies of Abrams, as Fackre is directed towards tracking the time a user spends accessing data and billing the user based on that user's overhead, billing cost for the user, or the cost of access to the data. See Fackre, paragraphs [0007] and [0008], as well as FIG. 1 and FIG. 2. As such, Fackre is directed towards charging customers based on resource access, not a method for determining cost of using a standby resource activated in response to a resource requirement as recited in claim 1. A

thorough search through Fackre yielded no disclosure of automatically determining a cause of anything, let alone that determining a cause for a resource requirement includes detecting an occurrence of a failure. Thus, Applicant respectfully submits that Abrams and Fackre, taken alone or in combination, fail to disclose or suggest determining the cause of the resource requirement, particularly where determining the cause includes detecting an occurrence of a failure.

Claim 1 further recites retrieving a code associated with the determined cause from an electronic log and correlating the code to a charge indicator in response to retrieving the code, wherein the charge indicator pertains at least in part to the determined cause. In the rejections of now cancelled claims 3, 5, and 6, the Examiner admits that Abrams fails to disclose these limitations, and thus relies on Fackre. However, Fackre does not relieve the deficiencies of Abrams. Fackre bills the user based on resource factors that include the user's overhead, billing cost for the user, billing cost for the user type, or the cost of resource access. See Fackre, paragraphs [0007] and [0008], as well as FIG. 1 and FIG. 2. However, Fackre's resource factor is not a code associated with a determined cause. As disclosed in the specification, the code recited in claim 1 is an error code generated by the computer system indicative of errors, failures, lagging performance, or other undesirable operation of the computer system. See paragraphs [0033], [0042] and [0045] of the published application. Thus, the code is associated with the determined cause, retrieved from the electronic log, and correlated to a charge indicator, which itself pertains at least in part to the determined cause. See paragraphs [0045]-[0049]. Therefore, the code may be used to obtain the specific charge for the specific failure that has occurred. Fackre merely discloses that there are resource factors, but fails to disclose that a resource factor may be a code associated with a specific occurrence of a failure.

Finally, claim 1 recites that the charge indicator includes a reduced rate relative to another charge indicator that is correlated to another code that is associated with a cause other than a cause associated with an occurrence of a failure, and determining the cost for using the standby resource according to the charge indicator and the duration of standby resource activation such that the cost for using the standby resource is reduced relative to if the cause of the resource requirement was for other than an occurrence of a failure. Put another way, claim 1 recites that a charge indicator for a failure includes a reduced rate relative to a charge indicator for something other than a failure, and that that a cost for using

the standby resource when the determined cause is an occurrence of a failure is reduced relative to a cost for using the standby resource when the determined cause is for other than an occurrence of a failure. Abrams discloses that application providers are charged based on the amount of resources utilized to complete the request, including being charged based on the number of application instances and whether the resources are used during peak or non-peak hours. See Abrams, paragraphs [0078] and [0106], respectively. As such, Abrams does discriminate between charging for computational resources based on the amount of computational resources and when the computational resources are activated. However, Abrams fails to disclose charge indicators that are based on whether the cause of the resource requirement is an occurrence of a failure or something other than an occurrence of a failure. Similarly, Abrams fails to disclose costs for using the standby resource that are reduced relative to if the cause of the resource requirement was for other than an occurrence of a failure. Fackre fails to relieve this deficiency, as Fackre merely bills the user based on resource factors that include the user's overhead, billing cost for the user, billing cost for the user type, or the cost of resource access. See Fackre, paragraph [0024] and Table 1.

Applicant respectfully submits that claim 1 indicates a novel and useful method of determining a cost for using a standby resource in a computer system, which enables, among other advantages, customers to be charged different rates for using standby resources based upon whether their usage was caused by a failure. By doing so, greater goodwill may be engendered with customers by reducing their costs when failures occur.

Because the specific limitations of claim 1 are not present in any of the references, there must be some objective reason why one of ordinary skill in the art would modify the disclosures of the various references to incorporate the specific limitations recited in claim 1. However, in the rejections of claims 3, 5, and 6, all or part of which have been incorporated into claim 1, the Examiner offered no motivations for combining the cited art other than stating the particular purpose of the particular pieces of cited art. As such, Applicant respectfully submits that the Examiner has failed to provide an objective reason why one of ordinary skill in the art would be motivated to modify the disclosures of the references to incorporate the specific limitations recited in claim 1. Indeed, only through the benefit of hindsight, the Examiner has used Applicant's disclosure as a blueprint to allege that one of ordinary skill in the art would think to perform the claimed steps in the claimed method.

Applicant respectfully submits that, in light of the foregoing, Abrams and Fackre, as well as the other cited art, whether taken alone or in combination, fail to disclose or suggest all the limitations of amended independent claim 1, and therefore a *prima facie* case of obviousness as alleged by the Examiner does not exist. As such, Applicant respectfully submits that amended independent claim 1 is novel and non-obvious over the prior art of record. Therefore, Applicant respectfully requests reconsideration and allowance of claim 1, and of claims 2, 4, 8-11, 13, 15, and 35, that depend therefrom.

With regards to new claim 35, this claim is dependent on claim 2 and further recites that standby resource is a first standby resource and activated in response to a first resource requirement, and the charge indicator is a first charge indicator. In response to activating a second standby resource in response to a second resource requirement, the method further comprises automatically determining a cause of the second resource requirement, wherein determining the cause of the second resource requirement further includes detecting a cause other than an occurrence of a failure. A second code associated with the determined cause of the second resource requirement is retrieved from the electronic log, and, in response to retrieving the second code, the second code is correlated to a second charge indicator pertaining at least in part to the determined cause of the second resource requirement, wherein the second charge indicator includes a higher rate relative to the first charge indicator. A second duration of second standby resource activation is determined in response to automatically determining the cause of the second resource requirement, and a cost for using the second standby resource according to the second charge indicator and the second duration is determined. Thus, claim 35 parallels to some extent the method of claim 1, where the first charge indicator is lower than the second charge indicator because the second charge indicator is associated with a cause other than an occurrence of a failure. Applicant respectfully submits that Abrams, Fackre and the other cited art, whether taken alone or in combination, fail to disclose or suggest all the limitations of new claim 35. As such, Applicant respectfully submits that new claim 35 is novel and non-obvious over the prior art of record. Therefore, Applicant respectfully requests consideration and allowance of claim 35.

As a final matter, Applicant traverses the Examiner's rejections of the other dependent claims based upon their dependency on the aforementioned independent claims. Nonetheless, Applicant notes that a number of these claims recite additional features that

further distinguish these claims from the references cited by the Examiner. However, in the interest of prosecutorial economy, these claims will not be addressed separately herein.

In summary, Applicant respectfully submits that all pending claims are novel and non-obvious over the prior art of record. Reconsideration and allowance of all pending claims are therefore respectfully requested. If the Examiner has any questions regarding the foregoing, or which might otherwise further this case onto allowance, the Examiner may contact the undersigned at (513) 241-2324. Moreover, if any other charges or credits are necessary to complete this communication, please apply them to Deposit Account 23 3000.

Respectfully submitted,

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Date

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